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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 330

ESSO STANDARD OIL COMPANY,

Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER OF FINANCE AND TAXATION OF THE STATE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE

STATEMENT AS TO JURISDICTION

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Of Counsel.

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Constitution of the United States, Fourteenth Amendment
Executive Order Number 9001, dated December 27, 1941
First War Powers Act, 1941 (Act of December 18, 1941, P. L. 354, C. 593, Title II, Section 201, 55 Stat. 839)
Tennessee Code of 1932, Sections 1126 through 1147 (The Official Code of Tennessee, pages 278 through 283, as amended by Chapter 40, Acts of 1931, Chapter 130, Acts of 1933, Chapter 202, Acts of 1937, and Chapter 50, Acts of 1943)
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IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity

ESSO STANDARD OIL COMPANY,
Complainant-Appellant,

vs.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.,
Defendant-Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the rules of the Supreme Court of the United States, as amended, complainant-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Tennessee entered in this cause.

I

Opinions Below

The opinions below have not been reported. The opinion of the Supreme Court of Tennessee filed June 7, 1952, will be reported in 194 Tennessee. Copy of same is attached hereto as Appendix A. Copy of the opinion on petition to rehear filed July 11, 1952, is attached hereto as Appendix

B. Copy of the opinion of the Chancellor is attached hereto as Appendix C.

II

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered June 7, 1952. Petition to rehear was seasonably filed June 16, 1952, was entertained, and was denied July 11, 1952. A petition for appeal is presented to the Supreme Court of Tennessee herewith, to wit, on August 8, 1952. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c).

III

Tennessee Statutes Involved

The statutes of Tennessee, the validity of which is involved, are Sections 1126-1147 of the Code of Tennessee (1932) found at pages 278-283 of the Official Code, as amended by Chapter 40, Acts of 1931, Chapter 130, Acts of 1933, Chapter 202, Acts of 1937, and Chapter 50, Acts of 1943. The pertinent portions of these statutes as found in Williams Tennessee Code, Annotated, are included herein as Appendix D, except that Chapter 50, Acts of 1943, is copied in its original form.

IV

Nature of the Case

This case involves the validity of the seven cents per gallon Tennessee gasoline tax statutes as applied to aviation gasoline purchased by the United States at various refineries and transported by it, by common carrier river barges to Memphis, Tennessee, where it was stored in tanks, pending orders for the gasoline from various airfields in

Tennessee, Mississippi and Arkansas. The validity of said statutes was drawn in question on the ground of being repugnant to the Constitution of the United States and the decision of the Tennessee Supreme Court was in favor of their validity. Reference is made to the assignment of errors filed in connection with this appeal, attached hereto as Appendix G.

Under the provisions of the First War Powers Act, 1941 (Act of December 18, 1941, P. L. 354, C. 593, Title II, Sec. 201, 55 Stat. 839), and Executive Order No. 9001, December 27, 1941, the War Department, commencing in 1943, entered into successive contracts with Standard Oil Company of Louisiana for the storage and handling of this government owned aircraft engine fuel. Some of the tanks used for such storage were owned by Standard Oil Company of Louisiana (subsequently merged into Esso Standard Oil Company, formerly Standard Oil Company of New Jersey), hereinafter for convenience referred to as "Esso," and some of the tanks were leased by Esso from Lion Oil Refining Company for the purpose of storing such gasoline. The applicable contracts for the month of January, 1944, are complainant's Exhibit 1, relating to the tanks at Memphis owned by Esso, complainant's Exhibit 2, relating to the tanks at Memphis leased by Esso from Lion Oil Refining Company and complainant's Exhibit 3, relating to storage of a relatively insignificant quantity of gasoline at Knoxville.

During said month 2,840,529 gallons of aviation gasoline were received into storage in the tanks at Memphis (both the tanks owned by Esso and the tanks leased from Lion Oil Refining Company); 743,824 gallons from Esso's tanks were transported to the 70th Sub-Depot at the Memphis Municipal Airport by Esso in its own tank trucks; and 1,754,712 gallons from Esso's tanks were delivered to common carrier trucks to be transported to various airfields in

Tennessee, Arkansas, Mississippi and Alabama. The total service charge billed by Esso to the United States on the gallonage delivered during the month from its own tanks was $10,174.11, being at the rate of $.0066 per gallon for gasoline delivered to the Memphis Municipal Airport in its own trucks and $.0030 per gallon for gasoline delivered to common carrier trucks (Complainant's Exhibit 36). These charges were fixed in Exhibit A-1 to the service contract relating to the use of Esso's tanks (Complainant's Exhibit 1). During the same month there were delivered from the tanks leased from Lion Oil Refining Company 238,182 gallons, all to common carrier trucks for transportation to airfields in Arkansas, Mississippi and Missouri, and the service charge on this gasoline was $.0018 per gallon or $428.73 (Complainant's Exhibit 37). This was the charge fixed in Exhibit A to the applicable service contract (Complainant's Exhibit 2). There was also a monthly use price of $450.00 for these tanks,—the exact amount paid by Esso to Lion Oil Refining Company (Complainant's Exhibits 2 and 34). During the same month there were deliveries of 28,334 gallons of gasoline at Knoxville for which a charge of 6.20¢ per gallon was made,—this gasoline being delivered into the tanks of the airplanes (Complainant's Exhibits 3 and 38).

Each contract provided for the reimbursement by the United States to Esso of local excise taxes to the extent that proof of exemption was not acceptable to the taxing authorities, but with the provision that the Government might litigate the liability for any such taxes in the name of the Contractor (Article 18 of Complainant's Exhibits 1, 2 and 3).

Information reports were made by Esso to the State of Tennessee with respect to all government owned gasoline stored and handled pursuant to these contracts. No

attempt was made by the State to tax this gasoline until 1949 when a new Commissioner of Finance and Taxation caused retroactive assessments to be made. By this time the statute of limitations had barred the year 1943. Esso, which was a qualified gasoline distributor under Tennessee law, was required to pay under protest the taxes, interest and penalties for January, 1944, as well as inspection fees, after threat of the issuance of distress warrant, and on instructions of the United States, Esso filed suit to recover. Failure to have paid the sum demanded would have resulted in the revocation of Esso's permit as gasoline distributor (Code sec. 1146).

The Chancery Court held that because of the delay and because Esso had been led to believe that there was no liability for the tax, it was inequitable to assess interest and penalties. The Court gave Esso judgment for the amount paid under protest which represented interest and penalties. The Court further held that the inspection fees were not properly assessed and gave Esso judgment for the amount of the sum paid under protest which represented such inspection fees. The Court held that the seven cents per gallon gasoline tax was properly assessed; that there was no implied constitutional immunity because the gasoline was the property of the United States; and that Esso should not recover that part of the sum paid under protest which represented such taxes. The Supreme Court of the State affirmed the lower court and denied petition to rehear in which it was contended that the statutes found to be applicable, as construed and applied, denied to Esso the equal protection of the laws, contrary to the Fourteenth Amendment of the United States.

V

Rulings of the Court and Stage of Proceedings Where Federal Questions Raised

In its original bill (R. 291-308) Esso expressly relied upon the principle of implied constitutional immunity. The United States intervened and adopted these allegations (R. 319-321). The Chancery Court ruled adversely to this contention (Exhibit C). The question was preserved by assignments of error made by Esso on appeal which were also adopted by the United States. These assignments of error are attached hereto as Appendix E. The Supreme Court of Tennessee ruled adversely to Esso and the United States on the constitutional immunity issue (Appendix A).

The equal protection of the laws clause of the Fourteenth Amendment was first relied upon in the petition to rehear. Copy of same is attached hereto as Appendix F. The Supreme Court of Tennessee entertained the petition to rehear, and while it did not expressly mention the Fourteenth Amendment, stated that the contention made was a "re-argument" (Appendix B). The reason the Fourteenth Amendment was not previously relied upon was that in no prior decision had the Supreme Court of Tennessee held that the gasoline tax could be assessed against anyone other than the owner of the gasoline. In the only prior case in which an attempt had been made to assess the tax against a bailee, the Court had decided against the State, saying: "The determinative question is: To whom does the gasoline belong when it comes to rest in the State of Tennessee?" (*Tennessee Oil Company* v. *Commissioner*, 173 Tenn. 683, at page 691). It was to be assumed that the Court would either overrule this case or apply it. Actually the Court adhered to its decision in

the Tennessee Oil Company case, but at the same time affirmed the lower Court, (which had ignored the Tennessee Oil Company case in its opinion), on the ground that the Tennessee Oil Company case was distinguishable on facts other than the ownership of the gasoline at the time it came to rest in the State of Tennessee.

Since the constitutional immunity question was expressly passed upon by the Supreme Court of Tennessee adversely to appellant's contention, and the validity of the statutes sustained, the Supreme Court has jurisdiction to review this case on appeal. *Charleston Federal Savings & Loan Assn.* v. *Alderson;* 324 U. S. 182, 185-6. Since this issue was appealable, the Supreme Court as jurisdiction to review the Fourteenth Amendment issue even if it were not itself appealable. *Flournoy* v. *Wiener;* 321 U. S. 253, 263. The decision of the Supreme Court of Tennessee in adhering to the decision in *Tennessee Oil Company* v. *Commissioner, supra,* and at the same time affirming the Chancery Court in the case at bar, was a surprise and could not have been reasonably anticipated from prior decisions. Hence it was not too late to raise the Fourteenth Amendment question in a petition to rehear. *Herndon* v. *Georgia,* 295 U. S. 441; *Great Northern Railway* v. *Sunburst Co.,* 287 U. S. 358, 367; *Saunders* v. *Shaw,* 244 U. S. 317.

The Questions Raised Are Substantial

The Supreme Court of Tennessee, in holding that the principle of implied constitutional immunity did not apply, relied mainly upon *Alabama* v. *King & Boozer,* 314 U. S. 1, and *Curry* v. *United States,* 314 U. S. 14. In these companion cases sales taxes and use taxes were upheld where assessed to cost-plus contractors with the United States on the privilege of purchasing and using property which subsequently became the property of the United States.

The legal incidence of the tax was held to be on the contractor in each instance and the property involved was found to have been purchased by the contractor and not by the United States. The fact that the property subsequently became the property of the United States was held to be immaterial.

In the case at bar, on the other hand, the gasoline which was the measure of the tax was at all times the property of the United States.

In relying upon the King & Boozer and Curry cases, the Supreme Court of Tennessee apparently treated as controlling the statement by Mr. Chief Justice Stone in the opinion in the latter case that "the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." In United States v. Allegheny County, 322 U. S. 174, there was no Congressional legislation to implement the constitution. Nevertheless, the Supreme Court held that a tax levied against Mesta Machine Company, lessee of machinery owned by the United States, was invalid where measured in part by the value of such machinery.

The Supreme Court of Tennessee distinguished the Mesta case on the theory that it involved "an ad valorem tax on personal property of the United States." Actually the assessment was made to Mesta Machine Company and no attempt was made to collect the tax from the United States. The tax was held invalid because the property by which the tax was measured was the property of the United States. The Supreme Court regarded substance rather than form and treated the tax as one on the property of the United States only because it was measured by that property. The United States was a party to the case only as intervenor, as is true in the case at bar. In the Mesta

case the tax was actually levied against the lessee, and in the case at bar against the bailee, of property belonging to the United States.

While the distinction between an ad valorem tax and an excise tax or privilege tax may be important as a matter of Tennessee law, it is of no significance where constitutional immunity is involved. The "practical operation and effect" of the tax is determinative. See New Jersey Realty Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665, at page 673.

The "setting of the applicable legislation and the particular exaction" (Mayo v. United States, 319 U. S. 441, 447-448) is such that the silence of Congress with reference to the Tennessee gasoline tax on this aviation gasoline has no significance. The contracts between the Government and Esso were made under the provisions of the First War Powers Act, 1941. When this legislation was enacted, and until 1949, when the assessments here in controversy were made, Congress had no intimation of any intention on the part of Tennessee to levy a seven cents per gallon tax on aviation gasoline, owned by the United States, merely because it was temporarily stored in tanks owned or leased by a company which had qualified as a gasoline distributor under Tennessee law.

If knowledge of state law is to be imputed to Congress, the construction of the Tennessee statutes by the Supreme Court of Tennessee (prior to the decision in the case at bar) was that the tax could be levied against no one but the owner. Tennessee Oil Company v. Commissioner, 178 Tenn. 683 (decided December 13, 1941). Moreover, the express language of Code secs. 1126 and 1127 seemed to preclude the assessment to a distributor of the tax on gasoline which had not been either manufactured or refined in Tennessee or imported into Tennessee by the distributor. In the case at bar the Supreme Court of Tennessee held

(Appendix A) that it was "unnecessary to decide" whether the statutes so provided "since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank." When the attention of the Court was called in petition to rehear to the proposition that removal from barges on the shore to tanks on the bank did not constitute importation, the Court said (Appendix B) that in the former opinion "we held that it was unnecessary to a decision, to decide whether or not Esso had imported the gasoline, and expressly so stated." The Court then quoted the language above quoted from the former opinion,—an unexplained contradiction. Congress could not have anticipated such a decision.

In the King & Boozer case the Supreme Court said that the tax upheld was non-discriminatory. If the Tennessee gasoline tax is not applicable under the Tennessee Oil Company case, because the distributor did not own the gasoline, but is applicable in the case at bar where the distributor did not own the gasoline, and the United States did own it, then the Tennessee gasoline tax cannot be said to be non-discriminatory.

The Supreme Court of Tennessee said: "We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of State action." This was equally true in the Mesta case. It is also significant that when the contracts with Esso were made covering January, 1944, and succeeding periods, the statutes now involved were in full force and effect; the State was fully advised as to the facts; and although the tax statutes required monthly assessments of the gasoline tax, no assessments were being made or had been made notwithstanding the fact that, with full knowledge of the State, gasoline was being stored and handled in the same manner throughout most of 1943. The Army officer who

was initially responsible for the contracts testified (R. 530-531) that he would not have made them except on the understanding that the tax was not required to be paid. The United States cannot be charged with a deliberate assumption of liability for this tax which was not assessed until 1949.

If the contracts with the United States are to be held irrelevant, on the constitutional immunity question, the equal protection of the laws clause of the Fourteenth Amendment is applicable. Under the doctrine of Tennessee Oil Company v. Commissioner, supra, the tax is not required to be paid by a distributor who stores and handles gasoline for the owner at a charge of two cents a gallon plus a charge of $1.00 for the use of the tanks. Under the doctrine of the case at bar the tax is required to be paid where the distributor stores and handles the gasoline for a charge of a fraction of a cent per gallon, with no extra charge for the use of its own tanks and a charge of $450.00 per year for the tanks leased by the distributor from another distributor. This is an arbitrary clasification without reasonable or substantial basis. "The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation". *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, at page 570. Esso has been selected "for discriminatory treatment" and has been denied "the right to equal treatment." *Hillsborough* v. *Cromwell*, 326 U. S. 620, at page 623. See also *Snowden* v. *Hughes*, 321 U. S. 1; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The arbitrary and discriminatory character of the statutes involved, as construed and applied in this case, is further demonstrated by the refusal to make allowance for 1,005,832 gallons of gasoline exported to other states by

common carrier, as provided in Chapter 50, Acts of 1943. In the opinion denying the petition to rehear (Appendix B) the Court treated the information reports made by Esso at the request of the Department of Finance and Taxation as tax returns, although not accompanied by any payment of tax under Code Section 1135, and held that because Esso failed to claim exemption for the tax on the exported gasoline, at a time when the State was treating all government owned gasoline as exempt, it lost its right to claim the exemption when the assessments were made several years later.

This case involves a substantial sum of money. For January 1944 the seven cents per gallon tax was assessed on 2,840,529 gallons, making a tax of $198,837.03. While this case involves only the month of January, 1944, the validity of the statutes as applied to gasoline similarly handled in succeeding months of World War II will depend upon the decision of this case. The taxes assessed for the remainder of 1944, 1945 and for the first six months of 1946 aggregated $3,818,212.16, exclusive of interest, penalties and inspection fees (R. 297). In sustaining the tax for the month of January, 1944, it is submitted that federal constitutional questions of great importance have been decided by the Supreme Court of Tennessee and that the decision of the State Court was not in accord with applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX A

For Publication. Gailor, J. Filed June 7, 1952

SUPREME COURT OF TENNESSEE, MIDDLE DIVISION AT NASHVILLE

DAVIDSON EQUITY

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, Commr., etc.

Honorable Thomas A. Shriver, Chancellor

AFFIRMED—Filed June 7, 1952

Waller, Davis & Lansden, for appellant.
Walker & Hooker, Cummings & Crabtree for appellee.

FRANK H. GAILOR,
Justice.

DAVIDSON EQUITY

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, Commr., etc.

OPINION

The bill in this cause was filed to recover certain gasoline taxes paid under protest by the Complainant on demand of the Defendant. In the Chancery Court, because certain governmental immunity was asserted, the Chancellor permitted the United States Government to file an intervening petition. For brevity and to conform with the method adopted by the parties, we will refer, in this opinion, to the Complainant as "Esso;" to the Defendant as "State;" and to the intervenor as the "United States."

The controversy rises out of services performed by Esso for the United States under written contracts which are exhibited. These contracts between the United States and Esso contained indemnifying clauses which provide for payment by the United States of any state taxes for which Esso may be made liable on account of its activities under the contracts.

During the war years the United States was purchasing at the refineries, all 100-octane and higher octane gasoline used in aviation. From the refineries, the gas was moved, usually by common carrier, and principally by river barge, to various storage points. The United States had no storage facilities nor personnel to store and handle the gasoline, and for these services contracted with private corporations.

Esso owned certain storage tanks at Memphis, and rented others from the Lion Oil Company, and then contracted with United States to store the aviation gasoline belonging to the United States, in these tanks, and with Esso personnel to distribute the gas from these tanks on order of the United States.

The gasoline came up the Mississippi River by barge from Louisiana, where it had been purchasd by the United States. When it arrived at Memphis, and while it was still on the barges, it was inspected by State officers, and thereafter pumped by Esso from the barges into its storage tanks, or in some cases, into tank trucks, and thereafter delivered to various Army posts on order of the United States. Some of these Army posts were in Tennessee, and others were in Arkansas and Mississippi.

Activity under the contracts here involved, commenced in 1943, and continued through the years 1944, 1945 and 1946. Since the Statute of Limitations had run on any taxes which accrued for the year 1943, the present suit was filed to recover taxes in the amount of $295,810.10, which had been paid under protest for the month of January 1944, after the State had prepared a distress warrant and threatened to have it served. It is agreed that the present suit is a test case, and will determine liability for taxes for the balance of the year 1944, and for the years 1945 and 1946. During the years when the contracts were in opera-

on and Esso was rendering its services to the United tates, inspection reports were rendered the Department f Finance and Taxation, and discussions were had with he State regarding tax liability. No formal decision of uch liability was ever made, either by the then Commis-ioner, or by the Attorney General. Esso insists that it elied on the contemporaneous and continued administra-ive construction of the then officers of the State, and that hey concluded that Esso was not liable for any gasoline axes in connection with the gasoline of the United States pon which Esso was rendering services under its con-racts. The State, on the other hand, insists that the mat-er of liability was held in abeyance and was uncertain, and hat Esso was never formally advised by any responsible uthority, that it was not liable for these taxes.

Under the contracts, Esso received as compensation, mounts ranging from 18/100 of a cent to 6-3/10 cents a allon for receiving and storing in its own facilities and hose leased from others, the gasoline belonging to the Jnited States. Also it received varying amounts for gaso-ne distributed by its own facilities, or delivered to car-iers on order of the United States.

From this, we conclude that the questions presented for ecision by this litigation are three, namely:

(1) On the facts stated, was Esso liable for inspection fees under Code sec. 6821?

(2) Was Esso liable for privilege tax for such operations under Code sec. 1126.1, et seq.?

(3) Was Esso liable for interest and penalties?

The Chancellor held that Esso was not liable for (1) and 3), but was liable for (2), and from those parts of the de-ree which were adverse, all parties have perfected ap-eals.

We consider first, the question of liability of Esso under Code sec. 6821, for the inspection fees. That section pro-ides that every consignment of volatile substances, as uch substances, are defined in previous sections of the Code, shall be inspected, and for such inspection, a charge hall be made to "the consignor or consignee," of 20 cents barrel. Fifty gallons shall constitute a barrel, and the ull charge made for any fraction of such barrel.

That this inspection fee is not merely a service charge, but is a revenue measure and an excise tax on the commodity, has been held in a number of our reported cases. State, ex rel Fort v. City of Jackson, 172 Tenn., 119; Texas Co. v. McCanless, 177 Tenn., 238.

From Judge Cook's discussion of the nature of the tax and its purpose in State v. Reed Oil Co., 176 Tenn., 10, 19-20, it is clear that the tax is laid upon the commodity itself, as an excise. In the present case, the gasoline, while it was in the barges on the river, and also while it was in the storage tanks on the bank, was admittedly the property of the United States. The inspections were made before the contract of Esso came into play, and before Esso had pumped the gasoline from the barge into its storage tanks. We, therefore, agree with the Chancellor, that the State has no power to levy a tax on property of the United States under these admitted facts.

We come next to the consideration of the second question, and Esso's liability for the privilege tax under Code secs. 1126, et seq. This privilege tax has also been defined by reported decisions of this Court.

> "This case (Foster & Creighton Co. v. Graham, 154 Tenn., 412) . . . settled the proposition that the tax . . . is a privilege tax on the engaging in the business of storing gasoline based on the number of gallons in storage." Texas Co. v. Fort, 168 Tenn., 679, 687.
>
> "Chapter 58, Tennessee Public Acts, 1923, as amended by chapter Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax 'on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline.' . . . . Storage of the gasoline and withdrawal of it from storage within the State for use or sale, are, as the State Supreme Court has held, the event which, by the very terms of the statute, call it into operation. Foster & C. Co. v. Graham, 154 Tenn., 412; Quick Service Tire Co. v. Smith, 156 Tenn., 102." N. C. & St. L. RR. Co. v. Wallace, 288 U. S., 249, 265, 77 L. ed., 737.

Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in the cases cited above, in the present case, it is unnecessary to decide that question since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank.

Further, Esso insists that the decision in Tennessee Oil Co. v. McCanless, 178 Tenn., 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the status of the Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business considering the vast amount of gasoline involved, since the contracts show that Esso charged from 18/100 of a cent to 6-3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the state insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel.

We conclude, therefore, that Esso was properly assessed with privilege taxes defined in Code Sec. 1126, et seq.

Esso further insists that some of the gasoline received in the Memphis tanks was later, on order of the United States, exported to Mississippi and Arkansas. As to the exported gasoline, it is insisted that if liable at all for the privilege tax, it is liable only for the tax at the export rate of 1/20 of one cent per gallon. Esso kept no figures of the amount of

the exported gasoline, and made no return showing those figures to the Department of Finance and Taxation, as the law requires. Apparently, it is impossible at this point, to establish with any accuracy, what those figures were. Since, under the frame of the Act, the assessment for the tax is made on the returns of the taxpayer, and since the taxpayer is claiming the exemption, the burden was on the taxpayer to show the exact amount of the gasoline exported, in order to avoid the higher rate. Hamilton Natl. Bank v. McCanless, 176 Tenn., 570; Fidelity-Bankers Tr. Co. v. McCanless, 181 Tenn., 476.

As to Esso's insistence that by reason of the fact that the State made no demand for the taxes when they became due, and that State officers acquiesced in the non-payment of taxes, that the State is now estopped and precluded from collecting the taxes, it is only necessary to say that there was never any formal remission of these taxes by any responsible authority, and there is substantial evidence in the record that the matter of taxability was held in abeyance and never decided. In any event, it is general law (31 C. J. S., Estoppel, p. 412, Sec. 140-b), which has many times been followed by this Court; Natl. Life & Acc. Ins. Co. v. Dempster, 168 Tenn., 446; Reynolds Tobacco Co. v. Carson, 187 Tenn., 157; American Bemberg Corp. v. Carson, 188 Tenn., 263; that a mistaken construction of the law by a public officer cannot work an estoppel against the State in the collection of its revenue. The record does not show that Esso was prejudiced in any way by a failure to collect the tax. State v. McPhail, 156 Tenn., 459, 460.

Finally, we consider the third question, and the assignment by the State, that the Chancellor committed error in remitting interest and penalties on the taxes. Under the facts of this case, where there had been no formal demand by collectors at the time the taxes were due, and when there was a bona fide doubt of tax liability, the remission of interest and penalty was within the sound discretion of the Chancellor on principles of equity; Brewing Co. v. Currier, 126 Tenn., 535, where at page 551 of the opinion, Judge Green cites with approval, the following statement from Cooley on Taxation:

"... the penalty should not be exacted if the delay came from serious doubt of the validity of the tax." (Cooley on Taxation, Vol. 2, p. 901.)

"This controversy is being waged in a court of equity and this Court, since East Tenn. Brewing Co. -vs- Currier, 126 Tenn., 535, has exercised the power of remitting penalties imposed upon taxpayers when the equities of the case seem to demand. See also Shipp -vs- Cummings, 158 Tenn., 526, and State et al. -vs- Rowan et al., 171 Tenn., 612." Memphis Nat. Gas Co. -vs- McCanless, 180 Tenn., 695, 705-706.

From the foregoing authorities, we conclude that the matter of the remission of interest and penalty was within the sound discretion of the Chancellor, and on the facts of this case, we find no abuse of that discretion.

Finally, we consider the intervening petition of the United States and its assertion of "implied immunity." We observe that any liability of the United States, under our decision, is the result of private contract with Esso, and not the result of State action. In argument, it was stated by counsel for the United States, that the authority upon which insistence for immunity is based, is the decision of the Supreme Court of the United States in *U. S.* v. *Allegheny County*, 322 U. S., 174, 88 L. ed., 1209. Since we have held that Esso was only liable for the privilege tax under Code sec. 1126 et seq., and since the only tax involved in *U. S.* v. *Allegheny County, supra*, was an ad valorem tax on personal property of the United States, we do not find that case in point here. That Esso was liable for the privilege tax for doing business in the State, though that business was done entirely with property of the United States is settled, we think, by *James* v. *Dravo Contracting Co.*, 82 L. ed., 125; *State of Alabama* v. *King & Boozer*, 86 L. ed., 3; *Curry* v. *U. S.*, 86 L. ed., 9. In the course of

the last opinion, which was by Mr. Chief Justice Stone, it was said:

> "As pointed out in the opinion in the King & Boozer case, by concession of the government and on authority, the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." *Curry* v. *U. S.*, 86 L. ed., 9, 11.

This rule was strengthened by the later cases of Penn. Dairies v. Milk Control Comm., 87 L. ed., 748, and Mayo v. U. S., 87 L. ed., 1504.

From these opinions of the Supreme Court of the United States, we conclude that if Tennessee sought to tax the gasoline which was stored, the tax would be invalid. Such would be the effect of our approval of the tax under section 6821 of the Code. In like manner, if the United States was storing its gasoline *in its own tanks*, the tax would be invalid, but in this case we have approved only the tax on Esso for exercising the privilege of doing business in Tennessee by storing and distributing gasoline which was the property of the United States. The validity of that tax follows from the decisions in State of Alabama v. King & Boozer, supra, and Curry v. U. S., supra,

All assignments of error are overruled and the decree of the Chancellor is affirmed. The parties will divide the costs of the appeal.

(Signed) GAILOR, J.

APPENDIX B

Filed June 11, 1952

DAVIDSON EQUITY

ESSO STANDARD OIL COMPANY

vs.

JAMES CLARENCE EVANS, Comm., etc.

On Petition to Rehear

Petition to rehear has been filed seeking a reconsideration of our former opinion. The petition is divided into three parts.

By the first part, it is insisted that Esso did not "import" the gasoline upon which the tax was laid. In our former opinion, we held that it was unnecessary to a decision, to decide whether or not Esso had imported the gasoline, and expressly so stated.

> "Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in the cases cited above, in the present case, it is unnecessary to decide that question since technically Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce on the barges on the river into its trucks and tanks on the bank."

We re-affirm that holding.

By the second part of the petition to rehear, it is re-argued that we should apply the rule made in Tennessee Oil Co. vs. McCanless, 178 Tenn., 483. We fully considered that case in our former opinion (pp. 7 and 8) and found and held that it was clearly distinguishable from the case at bar. We find nothing in the re-argument to change our former opinion, and the re-argument itself, clearly does not justify a rehearing under Rule 32 of this Court, 185 Tenn., 879.

By the third and final part of the petition to rehear, Esso claims that we should modify our former opinion, and make allowance to it on account of that part of the gasoline handled and taxed which was "export gasoline." Under the law, the tax is assessed on the returns of the taxpayer. It is not insisted that the Commissioner did not make the assessment in the present case, in accord with the return made by Esso. The Petitioner is, therefore, in the position of seeking to falsify its own return. This Court could only decide between conflicting returns and assessments, that is to say, if the Commissioner proposed one return and assessment, and the taxpayer proposed another, doubtless, this Court could decide between them, but the present record presents no such conflict.

We find nothing in the petition to rehear to escape the application of Rule 32, 185 Tenn., 879, and the petition to rehear is denied.

(Signed) GAILOR, *J.*

APPENDIX C

IN THE CHANCERY COURT, PART ONE, AT NASHVILLE

No. 68050

ESSO STANDARD OIL COMPANY

vs.

JAMES CLARENCE EVANS, Commissioner, etc.

CHANCELLOR'S OPINION

I

1. This suit was brought to recover $295,810.10 which said amount the defendant collected from the complainant as gasoline tax under Code Section 1126, et seq., and as inspection fees provided by Code Sections 6809, et seq., stored and handled by the complainant in this State for the

United States Government for the month of January 1944, together with penalties and interest thereon.

Said amount was paid under protest by the complainant on November 30, 1949, after a distress warrant had been prepared and signed by the defendant with a threat of its issuance and service.

The bill prays for a recovery of the aforesaid amount, together with interest from and after November 30, 1949, and further prays for a declaratory judgment as to the rights and liabilities of the parties with respect to taxes, inspection fees, penalties and interest for the remainder of the year 1944 and for the years 1945 and 1946.

It is said by counsel for the parties that if the complainant is liable for the taxes, inspection fees, penalties and interest as insisted upon by the State that the total amount involved will be well over Six Million Dollars.

2. During the time in question the complainant was engaged in the performance of contracts with the United States Government. Under the provisions of these contracts it received considerations ranging from eighteen one-hundredths of a cent to six and three-tenths cents per gallon for receiving and storing in its own facilities, and facilities leased by it for that purpose, gasoline belonging to the United States. It was to, and did, deliver for the United States at points within the State of Tennessee or delivered it to common carriers or contract carriers employed by the United States for transportation to points without the State of Tennessee, such transportation being in accordance with directions given to complainant by the United States as provided in the contracts.

The record shows that, at no time during any of the years in question, nor at any other time until August 10, 1949, did the defendant, Commissioner of Finance and Taxation, or his predecessors in office, make any demand upon the complainant for the payment of any tax, or inspection fee, on account of this government owned gasoline received by the complainant as above set out.

The gasoline in question was received at Memphis in barges and was there inspected by the State Coal Oil or Gasoline Inspectors as provided under Sections 6809, et

seq., of the Code, and reports of such inspections and reports from the complainant as to the said government owned gasoline were filed with the Department of Finance and Taxation in regular course.

The complainant insists that it relied on the contemporaneous and continued administrative construction placed on the Tennessee gasoline tax and oil inspection laws by the State of Tennessee and its officers charged with the administration and enforcement thereof, to the effect that the government owned gasoline received, stored and delivered by it in Tennessee was not subject to the Tennessee gasoline tax and the inspection fees later demanded by the State and paid under protest.

It is insisted by defendants that complainant was never told by any responsible authority of the State that it was free from liability for these taxes.

The fact remains, however, as hereinabove stated, that no demand was made for payment until some years after the accrual of the taxes while complainant always insisted that it was not liable.

3. Therefore, the question involved herein is the liability of the complainant, Esso Standard Oil Company, or its predecessor Standard Oil Company, for the gasoline tax and inspection fees on gasoline stored by the said Company and handled by it for the United States Government, which gasoline was the property of the United States.

II

1. The record shows that such inspections as were made by the agents of the State of Tennessee of the gasoline in question were made while the gasoline rested in barges on the Mississippi River prior to its being pumped from said barges into the storage tanks belonging to complainant.

Fees provided for in the State statutes (Section 5821) as amended, are based on the number of barrels, or fractions thereof, inspected.

The nature of this exaction has been considered by our Courts in a number of cases, and it is seen that the amount

of exaction largely exceeds the cost of inspection, and to that extent is an excise tax.

In State vs. N. C. & St. L. Ry., 176 Tenn. 24, the Court said:

> "This Court has long since recognized that the exaction here in question is in chief an excise tax and to a limited extent only an inspection charge. State of Tennessee v. Reed Oil Co., 176 Tenn., 10, 137 S. W. (2d), 292; State ex rel. v. Jackson, 172 Tenn., 119, 110 S. W. (2d), 323. This is to say the statute assesses an excise tax on the sale, use or storage of these products measured by the number of barrels sold, used or stored. This as well as some charge for inspection."

2. It is seen by this record that the customary procedure with respect to the inspection of gasoline was for the State inspector to obtain samples from the barges anchored in the Mississippi River and then seal said containers until the samples were tested, after which the complainant, Standard Oil Company, was given permission to pump the gasoline out of the barges and into its storage tanks.

The Court is, therefore, of opinion that the incidence of this inspection fee, or tax, arose before the Standard Oil Company became a storee of the government gasoline in question, and, since the complainant up to that time had not exercised the privilege of "sale, use or storage," the Court is of opinion the exaction under Code Sections 6809-6817, et seq., is not properly chargeable to the Standard Oil Company.

The Inspection Act (Code Section 6821) directs each inspector to charge the consignor, or consignee, the sum of twenty cents for testing a barrel or less quantity and twenty cents for each additional barrel.

It is insisted by the defendants that the Standard Oil Company was the consignee of the gasoline in question. The record shows that in some instances the gasoline was consigned to an officer of the United States Government, in care of Standard Oil Company at Memphis, while in other instances the consignment was filled out so as to name the Standard Oil Company, as consignee in the instrument;

however, the Court is of opinion that in the true sense, Standard Oil Company was neither consignee nor consignor, but that the substance of the transaction was that the government itself was the consignee of each of these shipments, and that the Standard Oil Company was simply the contractor employed to store and handle same for the government.

3. A State excise tax could not be a valid levy against the United States Government, the owner of said gasoline, therefore the complainant is entitled to a recovery of such amounts as were paid by it for so called inspection fees.

III

1. In considering the question of liability for the gasoline tax levied by Code Sections 1126, et seq., under the numerous decisions dealing with same, this tax must be regarded as an excise or privilege tax exacted by the State for the privilege of "transporting . . . distributing, storing, etc . . . for any purpose whatever."

2. There was no Act of Congress granting immunity from State and local taxes which applied in this case as was true under the majority opinion of our Supreme Court in Carbide and Carbon Chem. Corp. v. Carson, 239 S. W. (2d) 27.

In that case the Court recognized that liability for State excise, or privilege taxes, exacted against a contractor with the United States Government, was valid except for immunity granted by Congressional Act.

Under the facts shown by this record, the Court is of opinion that the Standard Oil Company did exercise the privilege of storing and handling the gasoline in question belonging to the United States Government under its contracts exhibited in the record, and that, as such storer and handler of gasoline for the fees provided in the contracts, it became liable for the tax levied under the aforesaid Sections of the Code (1126, et seq.).

IV

1. On the other hand, following the course of reasoning employed by the Supreme Court, speaking through Mr.

Justice Chambliss, in the case of *State of Tennessee, ex rel. v. The Texas Company* in an unpublished opinion (pronounced at the December Term 1937), but more particularly on the authority of *Memphis Natural Gas Company v. McCanless*, 180 Tenn., 695, this Court is of opinion that the complainant should not be held liable for penalties and interest in view of the facts and circumstances shown by this record and referred to hereinabove.

In Memphis Natural Gas Company v. McCanless, supra, the Supreme Court, speaking through Mr. Chief Justice Green, said:

> "This controversy is being waged in a court of equity and this Court, since East Tennessee Brewing Co. v. Currier, 126 Tenn., 535, 150 S. W. 541, has exercised the power of remitting penalties imposed upon taxpayers when the equities of the case seem to demand. See also Shipp v. Cummings, 158 Tenn. 526, 14 S. W. (2d) 747, and State et al v. Rowan et al., 171 Tenn. 612, 106 S. W. (2d) 861."

2. In connection with the question of the payment of penalties and interest it is to be observed that no levy was made by the then Commissioner of Finance and Taxation and, although the complainant, through its agents and attorneys, sought to determine whether or not the State proposed to exact gasoline taxes and inspection fees, it was never advised that such exactions would be made by the State, but, on the contrary, had reason to believe that the tax authorities of the State considered that it was not liable for such taxes and inspection fees.

While it is recognized that the failure of the taxing authorities to insist upon payment of a tax does not operate as an estoppel against the State acting through subsequent officials, yet it is felt by the Court that the course of conduct pursued by the State in this instance is such that penalties and interest should not be imposed or permitted to stand in a Court of Equity.

A decree in accordance with the above will be entered.

(Signed) Thos. A. Shriver,
Chancellor.

November 8th, 1951.

APPENDIX D

STATUTES INVOLVED

1126. *Definitions.*—

As used in this statute the term "person" means and includes every individual, firm, association, joint-stock company, syndicate, and corporation.

The term "distributor" means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline or distillate into this State, and distributing, storing, or making original sales of the same in this State, for any purpose whatsoever.

The term "original sales" as used in the definition of "distributor" shall mean the first sale made in this state after gasoline shall have been produced, refined and/or shipped or imported into this state, whether such sale shall be wholesale or retail, and/or to one for resale or use.

The term "dealer" means and includes every person other than a distributor, who engages in the business in this State, of distributing or selling gasoline or distillate within this State, and also every person who uses or consumes gasoline (except use or consumption in interstate commerce) when such gasoline has not previously been the measure of a privilege tax under this statute.

The term "gasoline" means and includes (a) the volatile substance produced from petroleum, natural gas, oil shales, or coal heretofore sold under the name of gasoline, (b) any volatile substance or product less than 112 Fahrenheit flash test when tested in a manner approved by U. S. bureau of mines derived wholly or in part from petroleum, natural gas, oil shales, or coal, and (c) benzol and or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

The term "gallon" shall mean the amount of gasoline, at a temperature of sixty degrees (60) Fahrenheit, necessary to completely fill a standard U. S. gallon liquid measure. (1933, ch. 130; 1937, ch. 202.)

1127. *Privilege tax on gasoline and distillate; original packages excepted; distribution to service stations as sales.*—

Every distributor when engaged in such business in this state, shall pay to the state comptroller through Commissioner of Finance and Taxation, for exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state, during such year; provided, that no gasoline or distillate shall be included in the measure of the tax liability of a distributor unless said gasoline or distillate shall have previously come to rest within the meaning of the Inter-state Commerce clause of the Federal Constitution; provided, further, that all gasoline and distillate distributed by any distributor to any of its service stations in this state shall be deemed to have been sold, and shall be treated in the same manner as though the same had been sold to dealers or other persons. (1931, ch. 40; 1933, ch. 130.) (Note: An additional tax of one (1c) cent per gallon of gasoline is provided for by the Acts of 1931, Second Extra Session, Chapter 11, and the Acts of 1933, Chapters 103, 117, and 118.)

1128. *Special privilege on gasoline and distillate; original packages excepted.*—

Every dealer each year, when engaged in such business in this state, shall pay to the state comptroller, through the Commissioner of Finance and Taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in such business in this state, equal to six cents for each gallon of gasoline and six cents

for each gallon of distillate sold or distributed or stored or used or consumed by such dealer in this state during such year; provided, that gasoline or distillate previously identified as a measure of tax liability of a registered distributor shall not be included in the measure of said dealer's tax liability; provided, further, that no gasoline or distillate shall be included in the measure of any dealer's tax liability unless said gasoline or distillate shall have previously come to rest within the meaning of the Interstate Commerce clause of the Federal Constitution; provided, further, that no gasoline or distillate shall be included in the measure of any dealer's tax liability when such gasoline or distillate was delivered within another state into the tank of the motor vehicle using it. (1931, ch. 40; 1933, ch. 130; 1937, ch. 202.)

(NOTE: An additional tax of one cent (1c) per gallon of gasoline is provided for by the Acts of 1931, Second Extra Session, Chapter 11, and the Acts of 1933, Chapters 103, 117, and 118.)

1129. *Monthly payments.*—

Such tax shall be paid in monthly installments. If the tax shall not be paid on or before the 20th of said succeeding month, it shall become delinquent, and subject to a penalty of one per cent. per day for not exceeding ten days, and it shall be the duty of the comptroller to proceed to collect same, with the penalty and interest by a distress warrant against the delinquent and his surety, and/or suit.

1130. *Loss of gallonage, allowance for, reports, proof.*—

(Omitted as not pertinent.)

1131. *Records kept by dealers and distributors, invoices of carriers, penalty.*—

Each person refining, storing, selling, distributing, or handling gasoline or distillate in this State, shall keep a record showing from whom the same was received, the date of its receipt, and the number of gallons received, together with such other further and different information as the Commissioner may require.

Persons transporting gasoline or distillate not previously identified as a measure of the tax liability of a registered distributor shall have at all times with them subject to scrutiny of representatives of the Department of Finance and Taxation and all peace officers a true record showing where and from whom the gasoline or distillate was received, day and time of receipt, number of gallons, destination, and such other, further, and different information as the Commissioner may require.

Persons transporting gasoline and distillate previously identified as a measure of the tax liability of a registered distributor, shall, if the quantity transported exceeds forty gallons, be subject to the provisions of the foregoing paragraph.

Violation of any of the provisions of this Section is hereby declared to be a misdemeanor and shall be punishable by a fine of not less than Twenty-five ($25.00) Dollars nor more than Fifty ($50.00) Dollars for each offense. (1933, ch. 130.)

1132. *Distributors must report monthly.*—

Each distributor must, within twenty days after the end of each month, make out in duplicate, on forms prescribed by the Commissioner of Finance and Taxation, and deliver to the said Commissioner, a true statement showing the total number of gallons of gasoline or distillate compounded, refined, manufactured, or produced by him in this State, and/or the number of gallons of gasoline or distillate transported, imported, or caused by him to be imported into this State; also a true statement showing the number of gallons stored, sold, or distributed by such distributor during the month; the total amount due the State as privilege taxes for such month, together with such other further and different information as the Commissioner shall require. (1933, ch. 130.)

1133. *Those not distributors, statement required.*—

Each person other than a distributor who may be required under the foregoing Sections to pay the privilege tax on gasoline or distillate, shall file a statement with the Com-

missioner of Finance and Taxation as required by Section 1132 and shall conform in all other respects to the provisions of said Section. (1933, ch. 130.)

1134. *Commissioner's Action on Reports.*—

The Commissioner shall file one of such statements in his office and shall deliver the duplicate copy thereof to the Comptroller. (1933, ch. 130.)

1135. *Distributors and dealers to pay when reports filed.*—

Each distributor and each dealer must, within twenty days after the end of each month, and at the same time the statement required by sections 1132-1134, is delivered to the Commissioner of Finance and Taxation, pay the Comptroller through the Commissioner of Finance and Taxation, the amount of privilege tax shown by such statement to be due for the month for which the statement is made and filed. (1933, ch. 130.)

1136. *Unlawful to fail to report or to make a false report.*—

It shall be unlawful for any distributor or dealer to fail, neglect, or refuse to make and file any statement required by the provisions of said sections, in the manner, or within the time therein provided, or to make any such statement false in any particular.

Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense. (1933, ch. 130.)

1137. *Penalties.*—

Upon the failure of any person engaged as distributor or dealer to make and deliver to the commissioner of finance and taxation the statement above provided for, or to pay the taxes due, it shall be the duty of the commissioner to revoke his permit, and immediately to proceed to inform himself as best he may regarding the matters and things to be set forth in such statement, and, from such information as he may be able to obtain, to make a statement, showing such matters and things, and determine and

fix the amount of the privilege tax due the state from such delinquent person, and proceed to collect said amount, including a penalty of one per cent per day, for not exceeding ten days, and interest, by the issuance of a distress warrant against the delinquent and the surety on his bond, and, if necessary, by suit on the bond. Upon the request of the Commissioner of Finance and Taxation, it shall be the duty of the attorney-general to institute and prosecute to conclusion all proper and necessary suits for the collection of the taxes. (1933, ch. 130.)

1138. *Statement prepared by commissioner presumed correct.*—

Said statement, as prepared by the Commissioner, shall be deemed prima facie correct, and the burden of proof shall be upon the distributor or dealer to prove its incorrectness in any action growing out of matters and things contained therein. (1933, ch. 130.)

1139. *Distributor to make invoices to purchasers of original packages.*—

Every distributor selling any gasoline or distillate in this state, in the original packages in which shipped, transported or imported into this state by such distributor, shall at the time of making such sale, make out and deliver to the purchaser thereof, an invoice, in which invoice shall be stated the number of gallons of gasoline or distillate covered by such invoice, and that the same has been sold in the original packages in which the same was shipped, transported or imported into this state.

1140. *Not apply to sales for and exported out of the state.*—

Gasoline or distillate not previously the subject of an original sale in this State, stored in this State for export to points outside the State, shall not be included in the measure of the tax liability of any distributor or dealer; provided that such gasoline or distillate is stored in a separate tank marked "export tank";

Provided that a bond is executed by the distributor or dealer that in the opinion of the Commissioner of Finance

and Taxation adequately protects the State against loss of tax in case said gasoline or distillate is not subsequently exported outside the State;

Provided that gasoline or distillate stored for export longer than a period of sixty days must be included in the measure of tax liability of the distributor or dealer so storing such gasoline or distillate. (1933, ch. 130.)

(NOTE: See Acts of 1943, ch. 50.)

1141. *Commissioner of finance and taxation to collect the taxes and pay to state treasurer; expenses limited.*—

It shall be the duty of the Commissioner of Finance and Taxation to collect all taxes accruing under this law, and to issue proper receipts therefor, and to pay all taxes so collected to the State Treasurer, who shall place them to the credit of a fund to be used solely in the construction and maintenance of the highway system of this State, and not exceeding two per centum (2%) of said fund shall be used for expenses of administration, provided, however, that as to the portion of said fund going to the counties, only one per centum (1%) shall be charged and deducted therefrom for the cost of collection and administration. (1933, ch. 130; 1939, ch. 207.)

1142. *Commissioner of finance and taxation may issue distress warrant for past-due taxes; penalty; fee.*—

The Commissioner of Finance and Taxation, in the name of the state, may issue a distress warrant for the collection of such tax when past-due, and for the penalties and costs; and a penalty of one per centum per day is imposed for the failure to pay such tax, and a fee of two dollars for the issuance of a distress warrant, and the usual commissions allowed officers collecting money by virtue of an execution issuing from a court of record; provided, however, when the penalty reaches ten per cent. no further penalty shall be collected. (1933, ch. 130.)

1143. *Dealers Required to Obtain Permit.* —

It shall be unlawful for any distributor or other person to engage in the business of selling, storing or distributing,

in intrastate commerce, gasoline or distillate without first having obtained a permit to carry on such business from the Commissioner of Finance and Taxation. (1933, ch. 130; 1937, ch. 202.)

1144. *Application.*—

Every person desiring a permit to engage in said business of distributor, dealer, or distributing and storing gasoline, shall make application in writing therefor to the commissioner, on forms to be by him provided, which application shall show:

(a) The name and address of applicant;

(b) Whether individual, partnership, association or corporation, and, if partnership or association, the names and addresses of each member;

(c) Whether it is the purpose of applicant to engage as distributor, dealer, or storer, and

(d) Whether wholesale, retail, or both.

1145. *Bond required.*

(Omitted as not pertinent.)

1146. *Revocation of permit.*—

The permit of every distributor, dealer or storer who fails to keep the records, or fails to make and deliver the statements and reports required, or who fails to pay the taxes accrued before they become delinquent, or fails to make and maintain bond as required by law, shall be revoked, and the carrying on of such business thereafter shall be unlawful.

If any distributor or other person operates without a permit a business for which a permit is required under the provisions of the preceding Sections he shall be guilty of a misdemeanor and shall be fined for each separate exercise of the functions of such business the sum of twenty-five to fifty dollars.

Provided, further, that the Commissioner may in his discretion and in the alternative, proceed under the provisions of Sections 9316 and 9317 of the Code of Tennessee, 1932, to

abate and enjoin the further carrying on of said business as a public nuisance. (1933, ch. 130.)

1147. *Forms.*—

It shall be the duty of the commissioner of finance and taxation to provide all necessary and appropriate blank forms and stationery for carrying the provisions of this law into effect, the same to be provided and paid for as other supplies for his department are provided; to cancel permits of delinquents and promptly report them to the comptroller for such proceedings as by law and this statute authorized. (1933, ch. 130.)

CHAPTER No. 50

Public Acts of 1943

Senate Bill No. 315

(By Ballew)

AN ACT to regulate the storage and inspection of gasoline and other volatile substances where the same is manufactured in Tennessee or has come to rest in Tennessee after shipment in interstate commerce and stored in this State pending the export of such gasoline or other volatile substances to points outside the State; to fix inspection fees and provide penalties for violation of the Act.

Section 1. Be It Enacted by the General Assembly of the State of Tennessee, That whenever any gasoline, benzol, burning oil, distillate, fuel oil, gas oil, kerosene, naphtha, or other volatile substances reflecting a gravity of [illegible]6 degrees or above on the Baume scale, produced from petroleum, natural gas or coal, by whatever the name known, and the substitutes therefor, are stored in this State, or whenever such products have come to rest after shipment in interstate commerce and are stored in this State, except when stored at or shipped to or from a petroleum refinery located in this State, and such products are subsequently exported to points outside the State, and same shall be inspected under the provisions of the Code of Tennessee, Sections 6809-6850.6 inclusive, and an inspection fee of one-

twentieth of one per cent per gallon is hereby levied upon such petroleum products temporarily stored in Tennessee and subsequently exported to points outside the State. Distributors or dealers of said exported petroleum products as enumerated in this Act shall make reports to the Commissioner of Finance and Taxation and pay all inspection fees herein levied in like manner as other oil inspection fees levied by the Code of Tennessee, Sections 6809-6850.6 inclusive.

Sec. 2. Be It Further Enacted, That any distributor, dealer or other person storing gasoline or other volatile substances enumerated in this Act for export, shall execute a bond which in the opinion of the Commissioner of Finance and Taxation adequately protects the State against loss of tax in case such gasoline or other volatile substance is not actually exported outside the State.

Sec. 3. Be It Further Enacted, That it shall no longer be necessary for distributors or dealers to maintain separate export tanks and to export gasoline or other volatile substances within sixty days as is provided by the Code of Tennessee, Section 1140.

Sec. 4. Be It Further Enacted, That all gasoline or other volatile substances as described in this Act which are exported to points outside the State, shall only be liable for the inspection fee of one-twentieth of one cent per gallon as levied in Section 1 of this Act, and there shall be no liability for gasoline taxes levied under the Code of Tennessee, Sections 1126--1148.3 inclusive, nor shall there be any liability for the inspection fees levied under the Code of Tennessee, Sections 6809-6850.6 inclusive—it being the legislative intent to make a separate classification for the gasoline and other volatile substances described herein which are exported to points outside the State.

Sec. 5. Be It Further Enacted, That the provisions of this Act shall not apply in any case except where such gasoline or other volatile substance is exported from the State of Tennessee by common carrier or contract carrier who are duly licensed and hold certificates from either the Interstate Commerce Commission or the Railroad and Public Utilities Commission of Tennessee, or both. Provided, however, that

the Commissioner of Finance and Taxation is authorized to promulgate rules and regulations permitting the export or movement to other states of the products enumerated in this Act by other modes of transportation; and the provisions of this Act shall apply where the export or movement beyond the State is made in compliance with such rules and regulations.

Sec. 6. Be It Further Enacted, That the provisions of this Act are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Act shall continue in full force and effect, it being the legislative intent now hereby declared that this Act would have been adopted even if such unconstitutional or void matter had not been included therein; that this Act take effect from and after its passage, the public welfare requiring it.

Passed: February 4, 1943.

BLAN R. MAXWELL,
Speaker of the Senate.
JAS. J. BROOME,
Speaker of the House of Representatives.

Approved: February 9, 1943.

PRENTICE COOPER,
Governor.

APPENDIX E

ASSIGNMENTS OF ERROR

1. The Chancellor erred in finding and holding that, under a proper construction of Code Sections 1126 et seq., Esso became liable for the seven cents per gallon gasoline tax by merely storing and handling aviation gasoline belonging to the United States Government aggregating $196,848.68 for the month of January, 1944 (Opinion, R. 365; Decree, R. 368-370).

2. The Chancellor erred in failing to find and hold that the course of conduct pursued by the State (leading Esso to believe that no tax would be imposed and thereby lulling it into security so that it did not take measures which

might have been taken to avoid the tax) was sufficient not only to require the remission of penalties and interest but also to require the remission of the tax itself (Opinion, R. 361-367; Decree, R. 368-370).

3. The Chancellor erred in failing to eliminate, in any event, from the measure of tax liability such gasoline aggregating in January, 1944, 1,005,832 gallons (R. 159, 174), as was shipped by common carriers to air fields in states other than Tennessee and there used (Opinion, R. 361-367; Decree, R. 368-370).

4. The Chancellor erred in construing the Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso's gasoline tax of gasoline belonging to the United States exclusively, and merely in the possession of Esso as agent or bailee, because the Tennessee gasoline tax laws so construed are repugnant to the Constitution of the United States and void under the principle of implied governmental immunity (Opinion, R. 365; Decree, R. 368-370).

5. Having construed the Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso's gasoline tax of gasoline belonging exclusively to the United States, the Chancellor erred in not holding that, as so construed, the Tennessee gasoline tax laws are repugnant to the Constitution of the United States, and void under the principle of implied governmental immunity (Opinion, R. 365; Decree, R. 368-370).

6. The Chancellor erred in failing to hold that the assessment to Esso, for the purposes of the Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void, for the reason that such assessment is upon or measured by the exclusive property of the United States which is immune from taxation by the State of Tennessee under the Constitution of the United States (Opinion, R. 365; Decree, R. 368-370).

(The United States, Intervenor, in its separate brief filed herein, has adopted the foregoing assignments of error.)

APPENDIX F

Filed June 16, 1952

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

Davidson Equity

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.

Petition for Rehearing on Behalf of Appellant, Esso Standard Oil Company

WALLER, DAVIS & LANSDEN,
Solicitors for Petitioner,
Esso Standard Oil Company.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

Davidson Equity

ESSO STANDARD OIL COMPANY

v.

JAMES CLARENCE EVANS, COMMISSIONER, ETC.

Petition for Rehearing on Behalf of Appellant, Esso Standard Oil Company

MAY IT PLEASE THE COURT:

Your petitioner, Esso Standard Oil Company, one of the appellants herein, referred to as "Esso", respectfully states that it is much aggrieved by the opinion and decision of this Court rendered in this case on June 7, 1952, in that Your Honors affirmed the decree of the

Chancellor, denying to the petitioner refund of gasoline privilege taxes assessed against it under Sections 1126 et seq. of the Tennessee Code.

Your Honors held in the opinion of the Court written by Mr. Justice Gailor that Esso was properly assessed the seven cents per gallon tax for exercising the privilege of storing aviation gasoline belonging to the United States Government, including gasoline exported by common carrier to other states, but that penalties and interest and the inspection fee should be remitted to Esso.

1. *Esso did not import the gasoline into Tennessee.*

In holding that Esso was properly assessed with privilege taxes under Code Section 1126 et seq., it was stated in said opinion of this Court:

> "Esso contends that it is a condition precedent to liability for this tax, that the taxpayer shall have imported the gasoline. While we find no support for this argument in *the cases cited above*, in the present case, it is unnecessary to decide that question since technically *Esso did import the gasoline into Tennessee by removing it from the channels of interstate commerce* on the barges on the river into its trucks and tanks on the bank." (Unless otherwise noted, all emphasis in quotations has been added.)

Esso contended that the condition precedent to its tax liability, that the gasoline shall have been imported or transported by it "*into*" Tennessee, is expressly provided in Code Section 1127 imposing the tax and in the definition of the term "distributor" in Code Section 1126. Esso did not contend that this statutory condition was also to be found in the cases cited by the Court. In all the cases cited, the condition precedent was in fact satisfied because the owner of the gasoline had not only stored the gasoline but had previously imported the gasoline *into* Tennessee from outside the State.

The primary meaning of the word "import" is "to bring from a foreign country into one's own country; as, we import

wines from France." Twentieth Century Dictionary. The word was recently defined by the Supreme Court of the United States in Canton R. Co. v. Rogan, 340 U. S. 511; 95 L. Ed. 488, as follows (340 U. S. at p. 515):

> "To export means to carry or send abroad; to import means to bring into the country. *Those acts begin and end at water's edge.* * * *"

Importation from one state into another is analogous to importation from one country into another. When the barges tied up at the docks on the Mississippi River the gasoline in them was already inside the State of Tennessee. Arkansas v. Tennessee, 246 U. S. 158. In fact, as found by the Chancellor, the gasoline had been inspected by the State (R. 363) and had, therefore, become subject to the jurisdiction of the State of Tennessee before Esso took possession of the gasoline.

A case closely in point is State v. Fidelity & Deposit Co. of Maryland et al., 78 P. 2d 1090, decided by the Supreme Court of Washington in 1938. In that case the State of Washington attempted to collect the "fuel oil tax" from a railway company for the privilege of distributing oil. The court analyzed the statute in question as follows (78 P. 2d at p. 1092):

> "It appears, upon analysis of section 79 of the act, that three classes of distributors are taxed, namely: (a) Persons who refine, manufacture, produce, or compound fuel oil and sell, distribute it, or in any manner use the same within the State; (b) persons who import any fuel oil into the State, and store, sell, withdraw, distribute, or in any manner use the same within the State; (c) persons who, having acquired fuel oil in original packages or containers, distribute or sell the same, whether in the original package or container or otherwise, or in any manner use the same."

It then held that the railway company was not liable for the tax because, although it had received and stored the oil

in question, the oil had been imported into the state by another party. The Court said:

> "The word 'import' when used as a verb, means, by derivation, 'to bear or carry into,' and by common usage, 'to bring in.' In its technical meaning, it is usually employed to designate the bringing in of articles from a foreign country. In this statute, it evidently means the bringing into the state of fuel oil from any place without the state. A person who 'imports' fuel oil into the State is one who brings fuel oil into the State."
>
> * * * * * * *
>
> "* * * it is admitted that the oil in question was brought into the State by the oil company and was there sold to the railway company just as the contract contemplated. We therefore hold that the oil company, and not the railway company, imported the oil. Accordingly, the railway company does not fall within any of the classes of persons which the statute makes subject to the tax, for, although it stored and used it, it did not import and store, etc. * * *"

2. *The grounds given in the opinion of the Court for distinguishing Tennessee Oil Co. v. McCanless, 178 Tenn. 683, raise new issues of constitutional law.*

The opinion of the Court on this subject was as follows:

> "Further, Esso insists that the decision in Tennessee Oil Co. vs. McCanless, 178 Tenn. 683, relieves it from liability in the present case. We find that case clearly distinguishable on the facts. In that case, the Obion County Board of Education rented a storage tank from the Tennessee Oil Company, with an agreement that it would pay the Tennessee Oil Company a fee of two cents a gallon for distributing the gas on order of the Board. In legal effect, the Board of Education, which was exempt, was storing gasoline in its own tank. Although the rental of the storage tank was a nominal amount, it had the effect of changing the status of the

Tennessee Oil Company from that of an independent contractor to that of an agent or servant of the Board. In the present case, the charge which Esso made the United States for storage alone, was a very substantial and lucrative business and considering the vast amount of gasoline involved, since the contracts show that Esso charged from 18/100 of a cent to 6 3/10 cents per gallon for receiving and storing the gasoline in its tanks. This was particularly true, as the State insists, since at the time of these contracts the United States owned all gasoline of this quality, and without this Government business, Esso would have had no lucrative return on its tanks, and made no money with which to pay its personnel."

In the case at bar the Court holds for the first time, in construing Code Sections 1126 et seq., that the ownership of the gasoline is immaterial. In the Tennessee Oil Company case the Court held that the *determinative* question was "To whom does the gasoline belong when it comes to rest in the State of Tennessee"? (178 Tenn. p. 691)? As now construed, Code Sections 1126 et seq., impose a tax of seven cents per gallon under the facts disclosed by the record in the case at bar, but no tax under the facts of the Tennessee Oil Company case. As so construed, Code Sections 1126 et seq., deny Esso the equal protection of the laws guaranteed by the Fourteenth Amendment and are unconstitutional and void because there is no reasonable basis for the classification made by the Court.

Your Honors did not undertake in the opinion filed to spell out in detail the distinction or distinctions between the two classes of cases,—the one where the tax is not due, and the other where the tax is due. Your Honors did hold, as we read the opinion, that the distinction or distinctions between the two classifications are not such that Esso and the United States could have chosen to come within the exempt class, rather than in the non-exempt class, and have made this choice effective by a formal change in the contracts, such as a provision for the payment of a nominal flat rental for the use of the tanks in addition to the charge per gallon.

We say this because Your Honors held that Esso was not "prejudiced in any way" by the State's failure to collect the tax as and when it became due. Obviously if Esso and the United States could, by some such formal change, have put themselves in the Tennessee Oil Company classification, the State's failure to collect the tax as and when it became due, misled Esso and *did* prejudice it. The collection of the tax for one month would have enabled the parties to avoid the tax for all succeeding months.

Since Your Honors did not spell out the distinction or distinctions between the two classifications, we can do no more in this petition for rehearing than urge, as we do, that whatever the distinction or distinctions are, they are so unreasonable and arbitrary and lacking in substance as to render Code Sections 1126 et seq., unconstitutional and void because they deny Esso equal protection of the laws.

We deem it proper to point out in this connection that the statutory language itself gives no suggestion of a distinction or distinctions now made by the Court and that no prior decision of the Court suggests such distinction or distinctions.

We further deem it proper to point out that the charge of two cents per gallon made in the Tennessee Oil Company case covered both storage and distribution (within Obion County) and the range of fees in the case at bar, 18/100 of a cent per gallon to 6 3/10 cents per gallon, is based mainly upon the mileage involved in distribution, where such distribution was to be made in Esso's own equipment. In the case at bar (involving January 1944) the only distribution from the Memphis Terminal in Esso's own vehicles was of gasoline going to Memphis Airport. All the other gasoline was delivered by Esso to common carriers and the total charge made by Esso was a fraction of a cent per gallon. The facts in this regard are clearly set forth in the briefs heretofore filed, with specific references to the record.

It is well settled that an arbitrary classification for purposes of taxation conflicts with the Fourteenth Amendment. Schlesinger v. Wisconsin, 270 U. S. 230. The Fourteenth Amendment requires that the classification be not arbitrary, but based on a real and substantial difference having a

reasonable relation to the subject of the particular legislation. Quaker City Cab Co. v. Pa., 277 U. S. 389. Phrasing the same principle differently:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. * * *" (Hillsborough v. Cromwell, 326 U. S. 620).

It is respectfully submitted that the classification made by Sections 1126 et seq. of the Code of Tennessee, as now construed by the Court, is so arbitrary as to amount to no classification at all, and Esso specifically relies upon the equal protection of the laws clause of the Fourteenth Amendment as a ground for this petition for rehearing.

3. *Export gasoline.*

In the opinion of this Court, it was stated that "Esso kept no figures of the amount of the exported gasoline, and made no return showing those figures to the Department of Finance and Taxation, as the law required. Apparently, it is impossible at this point, to establish with any accuracy, what those figures were."

There has been no dispute as to the amount of export gasoline involved in this case. Esso did keep the figures and the exact amount for the month of January 1944 was 1,005,832 gallons. This was the exact amount alleged in the complaint (R. 7) and proved without contradiction (R. 159, 174), and is the amount specified in Esso's third assignment of error.

It is true that in Esso's monthly report to the Commissioner of Finance and Taxation which included all the government owned gasoline for January 1944, Esso did not give separate figures on the 1,005,832 gallons of export gasoline. The reason for this was obvious. At the time the gasoline in question was inspected, stored for export and exported, the State was not claiming that any of the government owned gasoline was subject to either the gasoline privilege taxes or to the inspection fee. It was useless for

the taxpayer to pay 1/20 cent per gallon inspection fee and claim an exemption as to additional taxes at a time when the State was not claiming any tax liability.

No requirement of law has been pointed out whereby Esso was required to make any return or report on the export gasoline other than it has done. Chapter 50 of the Public Acts of 1943 (Williams Code, Sections 6850.7-6850.11), the statute which provides for the exemption, was attached as an appendix to Esso's Assignments of Error, etc. on this appeal. We find no provision in this statute requiring Esso to make any reports other than the reports it has made. In the letter of December 16, 1943, in which Mr. Weakley requested Esso to make monthly reports of the government owned gasoline, no request was made that the export gasoline be reported separately (Defendant's Exhibit 4). Esso included in its monthly returns all the information the Department of Finance and Taxation called for and no tax was assessed thereon until shortly before this litigation commenced. Beginning promptly after the assessment and collection of this tax on all the government owned gasoline, Esso has consistently claimed that it is entitled at least to exemption from all but the inspection fee of 1/20 of 1 cent per gallon on the 1,005,832 gallons of export gasoline.

In denying the contention of Esso that because of the inequitable course of conduct of the State, the State should be denied recovery of the taxes at this late date, the Court concluded with the statement that "The record does not show that Esso has been prejudiced in any way by a failure to collect the tax."

Even if the State cannot be estopped, still it should not be permitted to profit from its own wrong. The state officials misled Esso into believing that separate reports and payment of 1/20 cent per gallon on the export gasoline were not required. The Court correctly states that "under the frame of the Act, the assessment for the tax is made on the returns of the taxpayer." Here the State did not make such assessments until several years later. Esso has been prejudiced by such action of the State, at least in so far as the export gasoline is concerned.

Your petitioner respectfully requests a rehearing based upon the propositions discussed above.

A copy of this petition has been furnished counsel for the State.

Respectfully submitted,

WALLER, DAVIS & LANSDEN,
By (Signed) WILLIAM WALLER,
Solicitors for Petitioner,
Esso Standard Oil Company.

STATE OF TENNESSEE
County of Davidson

I, William Waller, make oath that I am one of the solicitors for the petitioner in this case and that in my opinion the petitioner is entitled to the relief sought.

(Signed) WILLIAM WALLER.

Sworn to and subscribed before me this 16th day of June, 1952.

(Signed) O. LAWRENCE DORTCH,
[SEAL.] *Notary Public.*

My commission expires: 1/12/55.

Receipt is acknowledged of a copy of the foregoing petition for rehearing. This 16th of June, 1952.

WALKER & HOOKER,
CUMMINGS & CRABTREE,
Solicitors for State of Tennesse,
By (Signed) K. HARLAN DODSON, JR.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

Davidson County

ESSO STANDARD OIL COMPANY, *Complainant-Appellant*,

vs.

JAMES CLARENCE EVANS, COMMISSIONER, ETC., *Defendant-Appellee*

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Esso Standard Oil Company, complainant-appellant in the above cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgment and decree of the Supreme Court of Tennessee entered June 7, 1952, and order denying petition for rehearing entered July 11, 1952.

The Supreme Court of Tennessee erred as follows:

1. Having construed the Tennessee gasoline tax laws (secs. 1126 et seq. of the Code of Tennessee (1932) as amended) as requiring the inclusion in the measure of Esso Standard Oil Company's gasoline tax of gasoline belonging exclusively to the United States, the Court erred in not holding that, as so construed and applied, said Tennessee gasoline tax laws are repugnant to the Constitution of the United States and void under the principle of implied constitutional immunity.

2. The Court erred in failing to hold that the assessment to Esso Standard Oil Company, for the purposes of said Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void for the reason that such assessment is upon or measured by the exclusive property of the United States, which is immune from taxation by the State of Tennessee under the Constitution of the United States.

3. Having construed said Tennessee gasoline tax laws as requiring the inclusion in the measure of Esso Standard

Oil Company's gasoline tax of gasoline belonging exclusively to the United States, which was the property of the United States when it came to rest in the State of Tennessee, and having at the same time adhered to its decision in Tennessee Oil Company v. Commissioner, 178 Tenn. 683, 157 S. W. 2d 267, construing said laws as not requiring the inclusion in a gasoline distributor's gasoline tax of gasoline stored and handled by such distributor which did not belong to it when it came to rest in the State of Tennessee, the Court erred in not holding that, as so construed and applied, the Tennessee gasoline tax laws are repugnant to the Fourteenth Amendment to the Constitution of the United States and void as denying to Esso Standard Oil Company the equal protection of the laws for the reason that the classification made by said laws, as so construed and applied, is arbitrary and without reasonable or substantial basis.

4. The Court erred in failing to hold that the assessment to Esso Standard Oil Company, for the purposes of the Tennessee gasoline tax laws, of gasoline belonging exclusively to the United States, which was the property of the United States when it came to rest in the State of Tennessee, by including the quantity of such gasoline in the measure of the tax assessed, is illegal and void, for the reason that such assessment denies to Esso Standard Oil Company the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the Court, in upholding such assessment, adhered to construction placed upon said laws in Tennessee Oil Company v. Commissioner, 178 Tenn. 683, 157 S. W. 2d 267, and the classification made by said laws, as so construed and applied, is arbitrary and without reasonable or substantial basis.

WHEREFORE, complainant-appellant, Esso Standard Oil Company, prays that the judgment of the Supreme Court of Tennessee be reversed, and for such other relief as the Court may deem fit and proper.

(Signed) WILLIAM WALLER,
Counsel for Complainant-Appellant.